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## SITING WIRELESS TELECOMMUNICATION FACILITIES

**E**SCALATING advances in telecommunications have created increasing pressure on municipalities to site telecommunication facilities. But because communications involve national interests, federal law limits the amount of control communities have over siting these facilities.

The Communications Act of 1934 was created to regulate communication by wire and radio so that all the people of the United States have efficient, world-wide wire and radio communication service at reasonable charges. The Federal communications Commission was created by the 1934 Act. The Telecommunications Act of 1996, signed into law in February 1996, completely updated the Communications Act of 1934. (The official citation for the new Act is: Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).)

The goal of this new law is to let anyone enter any communications business - to let any communications business compete in any market against any other. The Telecommunications Act of 1996 has the potential to change the way we work, live and learn. It will effect local and long distance telephone service, cable programming and other video services, broadcast services and services provided to schools.

### PRESERVATION OF LOCAL ZONING AUTHORITY

The Telecommunications Act of 1996 states that nothing in this Act shall affect the authority of a State or local government over decisions regarding the placement, construction, and modification of personal wireless service facilities except for the following:

- The regulation of personal wireless service facilities by any State or local government
  - 1) shall not unreasonably discriminate among providers of functionally equivalent services; and,
  - 2) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
- A State or local government shall act on any request regarding personal wireless service facilities within a reasonable period of time after the request is filed.
- Any decision by a State or local government to deny a request regarding wireless service facilities shall be in writing and supported by sub-

stantial evidence contained in a written record.

- No State or local government may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
- Any person adversely affected by any final action or failure to act by a State or local government that is inconsistent with this law may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government based upon the environmental effect of radio frequency emissions may petition the Commission for relief.

## SITING STRATEGIES FOR WIRELESS COMMUNICATION FACILITIES (WCF)

### ► **Moratorium**

The initial issue that has seems to arise most often is whether it is necessary or appropriate to enact a moratorium on WCF's until certain information can be gathered. Three things to remember with a moratorium: 1) The purpose must be clear, 2) during the moratorium some demonstrable progress must be made and 3) the moratorium must be timely and not unfairly effect individual service providers.

### ► **Variance**

Potential wireless facilities that are not allowed uses in the district in which they are proposed could be required to seek a variance. The variance case must, however, take into account whether denial of the application will result in a denial of wireless service to a community or a portion thereof. If a denial pursuant to traditional variance analysis would act to create a "gap" in service, the 1996 act may serve to preempt that analysis and require that the variance be issued.

### ► **Special Permit or Conditional Use**

Establishing specific requirements for WCF's through either the special permit or conditional use process, may allow facilities development in harmony with local planning goals.

### ► **Overlay Districts**

Planning for WCF development can also be accomplished by using overlay districts and altering the requirements for WCF, including towers, based on the underlying district requirements.

### ► **Floating zones**

Floating zones may also be used to help tower development remain consistent with a community's plan for development. Floating districts provide requirements for establishment of a particular use but are not tied to any particular geographic location. When a development proposal for a specific site meets the qualifications set out in the definition, the zone attaches to that site for purposes of that development. This technique could be applied to tower siting as well, with the elements of appropriate sites being defined but not attached to a particular site.

### ► **Co-location of wireless facilities**

There are numerous difficulties with the co-location of wireless facilities. Requiring competitors to share towers may inhibit competition, in that each providers' geographic coverage would be similar and would thus

decrease the potential for competition between them. Additionally, technology may preclude co-location because towers must be of appropriate construction for the varying uses potentially required of them. Finally, requiring an owner to share a tower may be difficult unless the tower is owned by a municipality. A municipal co-location requirement may be a prohibition on service, and thus be preempted by the Telecommunications Act.

Creating co-location incentives rather than mandates may encourage co-location. Incentives include: expedited approval process for siting facilities on existent towers; expedited approval process for siting towers that have additional capacity; and, assurances from tower owners to negotiate tower leases in good faith.

Building tower facilities that are large enough and designed to hold many different telecommunications facilities, including those belonging to the municipality, may allow for a reduction in the number of towers in a given area. One note of caution: it is possible that a restriction prohibiting all non-municipally owned facilities would be violative of the 1996 act, where municipally owned facilities are inadequate to allow for the full provision of service in a given area. Encouragement to use municipally owned facilities, as opposed to a mandate to do so is probably the safer path.

### ► **Control of Visual Impact**

There are a number of strategies to control the visual impact of WCF's. Affectionately known as "stealth" technologies some antennas and towers can be designed to be camouflaged, or incorporated into building and site designs. Bell towers, water towers, church steeples, utility poles, street lamps, trees and other methods have been employed to conceal antenna and towers. As with co-location and municipal facilities, encouragement toward camouflage techniques rather than a requirement is most likely best.

Questions about this topic, and about federal regulation of wireless telecommunications services in general, may be addressed to Karen Brinkmann, Associate Chief of the Wireless Telecommunications Bureau, 202-418-0783 or see the American Planning Association booklet *Implementing the New Telecommunications Law* (co-published by NACo, and APWA) or check the Federal Communications Commission Wireless Service Bureau web site at [www.fcc.gov](http://www.fcc.gov).